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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,
M/V FRANK X. ARMIGER, CAPTAIN HENRY BUSSEY,
and ABC INSURANCE COMPANY,
Petitioners,

v.

JOHN COSEY,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I) Does an employee of the State of Louisiana, injured while within the course and scope of his employment, escape the sole remedy provisions of LSA-R.S. 23:1034 restricting state employees to benefits under Louisiana's Workers Compensation Act (LSA-R.S. 23:1021 et seq.), by virtue of that employees' status as a seaman under federal law?

II) Does an employee of the State of Louisiana, by virtue of his status as a ferryboat worker, have greater rights to recover damages than do other State of Louisiana employees who do not work on ferryboats?

III) Since the State District Courts of Louisiana do not have jurisdiction to hear Workers Compensation claims (the same being reserved for an administrative law judge), does a Louisiana District Court gain jurisdiction to hear cases filed by state employees who are injured while within the course and scope of their employment simply because the injured state employee happens to work upon one of the states' ferryboats?

IV) May the State of Louisiana claim sovereign immunity in state court for a federal cause of action, when the Eleventh Amendment has barred the same suit in federal court?

V) Does the "Savings to Suitors Clause" of 28 U.S.C. § 1333, save for the employees of the State of Louisiana the right to sue in state court for injuries allegedly received while within the course and scope of their employment?

VI) Can the United States Congress pass laws allowing damages which results in the state waiving immunity for such claims, without the State expressly waiving such immunity?

VII) Can the United States Congress pass laws allowing certain Federal rights to be exercised in State Courts against the State which could not be exercised in Federal Court because of the Eleventh Amendment of the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of Certiorari issue to review the Judgment of the Trial Court in the Civil District Court for the Parish of Orleans in case No: 92-5913—Division "I" lately pending therein rendered in this proceeding October 23, 1993, see Appendix 6a, as affirmed by the Court of Appeal, Fourth Circuit, State of Louisiana, No. 92-C-2619 issued February 17, 1993, see Appendix 2a.

OPINIONS BELOW

Neither the judgment of the Civil District Court for the Parish of Orleans, State Trial Court, nor the decision of the Court of Appeal, Fourth Circuit, State of Louisiana, are reported.

The denial of review by the Supreme Court of Louisiana, *Cosey v. Department of Transportation and Development, et al.*, 618 So.2d 407, was entered on April 30, 1993 and appears as Appendix 1a hereto.

STATEMENT OF JURISDICTION

No application for rehearing to the Supreme Court of Louisiana is permitted and this petition for Certiorari was filed within ninety days of that Court's denial of review.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257.

STATUTES INVOLVED

U.S. Constitution, Eleventh Amendment.

1974 Constitution of the State of Louisiana, Art. 12 § 10.

28 U.S.C. 1333/Savings to Suitors.

46 U.S.C. 688/Jones Act.

Louisiana Workers Compensation Act LSA-R.S. 23:1021 et seq.

STATEMENT OF THE CASE

Plaintiff is an employee of the State of Louisiana. On May 14, 1991, he was allegedly injured while within the course and scope of his employment as an oiler aboard the M/V Frank X. Armiger, a ferryboat owned by the State of Louisiana under the custody and control of its Department of Transportation and Development (here after referred to as DOTD).

On April 10, 1992, plaintiff filed suit in Civil District Court for the Parish of Orleans, State of Louisiana, alleging a right to recover maritime damages from the State of Louisiana pursuant to federal remedies under the general maritime law and the Jones Act, 46 U.S.C. § 688.

Plaintiff also filed a suit in the United States District Court for the Eastern District of Louisiana and a claim for benefits under the Workers Compensation laws in District 6 of the Office of Workers Compensation.

The action in the United States District Court was dismissed, with the court holding that the State of Louisiana, Department of Transportation and Development, *had not waived its immunity to suit* guaranteed by the Eleventh Amendment to the United States Constitution.

In response to the allegations maintaining a right to recover damages under the general maritime law and the Jones Act, DOTD filed an Exception of No Cause of Action, maintaining that plaintiff's sole exclusive remedy, as a state employee, is for benefits under the state mandated Workers' Compensation Act, LSA-R.S. 12:1021 et seq. (An Exception of No Cause of Action in Louisiana is a peremptory exception filed by the defendant to allege that the plaintiff has not stated in his pleadings a cause of action. The exception is governed by the pleadings only and the effect of maintaining the exception is dismissal of plaintiff's suit).

The trial court, after considering legal memoranda and argument, in a judgment rendered October 23, 1992, overruled DOTD's exception. The effect of the ruling is to allow a state employee, just because he happens to

work on a ferryboat, to attempt to recover damages which are not available to any other state employee. DOTD applied for Supervisory Writs to the Louisiana Court of Appeal, Fourth Circuit, which granted a writ to review the judgment of the trial court and, in a written opinion, affirmed the decision of the trial court.

On March 17, 1993 DOTD filed its application in the Supreme Court of Louisiana for a Supervisory Writ to Review the Decision of the Court of Appeal, Fourth Circuit. On April 30, 1993 the Supreme Court of the State of Louisiana denied the application of DOTD.

REASONS FOR ALLOWING THE WRIT

SUMMARY

The Eleventh Amendment of the United States Constitution, as interpreted by the Supreme Court, bars a citizen from suing any state, including his own, in the Federal Court.

Hans v. Louisiana, 134 U.S. 1, 33 L.Ed. 842 10 S. Ct. 504 (1890).

An employee of a state may not institute suit in federal court against the state under maritime law and the Jones Act, because of the provisions of the Eleventh Amendment.

Welch v. Department of Highways and Public Transportation, 483 U.S. 468, 97 L.Ed. 389, 107 S. Ct. 2941 (1987).

The legal question that is not answered in *Welch* is whether the state's immunity to suit for maritime remedies in federal court extends to the same suit filed in a state court. Can a state be forced into its own courts by the laws of another sovereign when it cannot be forced into the other sovereign's court under the same laws? The Supreme Judicial Court of Massachusetts has held that it cannot be forced to do so and in effect, be required to waive immunity. *Estate of Rodney Morris v. Massachusetts Maritime Academy, et al*, 565 N.E.2d 422.

While a decision of the Massachusetts court is not binding on this court, the reasons for the decision are logical and consistent with many decisions of the Court.

States have retained their sovereign immunity and it must apply regardless of the court in which the State is being sued. Any conclusion to the contrary would decimate the force of the Eleventh Amendment and demote it into nothing more than a choice of forum clause; either the State must consent to be sued in federal court or it will be unwillingly subjected to process in its own courts.

The State of Louisiana has not waived its sovereign immunity to admiralty suits brought against it by an employee in federal or state court.

The United States has been allowed to limit its own employees benefits to those under the Federal Employee's Compensation Act (FECA) and not those allowed under traditional seamen's remedies for individuals who are not employees by the United States. *Johansen v. United States*, 343 U.S. 427, 72 S. Ct. 849 (1952).

If the federal government was not required to allow its employee maritime remedies and can restrict its employees to benefits under a workers compensation act, then why cannot the State of Louisiana restrict its employees in the same manner?

An employee of the State of Louisiana who was injured while within the course and scope of his employment cannot escape the exclusive remedy provision of Louisiana's Workers Compensation Act (LSA-R.S. 1034) to those exclusions under the Act (LSA R.S. 23:1021) et seq.

A state can only be sued for damages in either the federal or state courts if it has waived its sovereign immunity. The Eleventh Amendment precludes such a suit in the federal court and historic principles preclude a suit against a sovereign in the sovereign's own court.

The "Savings to Suitors Clause" of 28 U.S.C. 1333 has as its purpose the savings of a right which a citizen may

have when legislation is enacted. At the time of the adoption of the Jones Act, 46, U.S.C. 688 on June 5, 1920 the State of Louisiana did not recognize a right to be sued in its own courts for maritime damages sustained on board one of its vessels and "the clause" does not act to "save" anything for a plaintiff under the circumstances of this case.

A suit against state officials in their official capacities is not a suit against the officials but rather is a suit against the officials office and, therefore is no different from a suit against the State itself.

Ray Will v. Michigan Department of State Police, et al, 491 U.S. 58, 105 L.Ed.2d. 45, 109 S. Ct. 2304.

Therefore, the suit against Captain Henry Bussey and the M/V Frank X. Armiger should also be dismissed.

The language of the Jones Act does not amount to a clear statement of Congressional intent to abrogate the States' Eleventh Amendment sovereign immunity and a clear statement is required before a state may be required to entertain a damage suit against itself in its own courts.

The Congress of the United States cannot pass laws allowing certain federal rights to be exercised in state courts against the states which could not be exercised in federal court because of the Eleventh Amendment to the Constitution of the United States. When the issue to be resolved is one of statutory construction, of congressional intent to impose monetary liability on the States, the requirement of a clear statement by Congress to impose such liability creates a rule that ought to be of assistance to the Congress and the courts in drafting and interpreting legislation. The requirement also serves to make parallel two separate inquiries into state liability: Eleventh Amendment doctrine and canons of statutory interpretation. The resulting symmetry, making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it. It also avoids the federalism-related concerns that arise when the National Government uses the state courts as the exclusive

forum to permit recovery under a congressional statute. This is not an inconsequential argument. Symmetry in the law is more than aesthetics. It is predictability and order.

Hilton v. South Carolina Public Railways Commission, 60 U.S.L.W. 4056, 112 S. Ct. 560, 116 L.Ed.2d 560.

The State of Louisiana has been deprived of predictability and order regarding its employees who are classified as seamen under federal law. Therefore, this court should provide to the State of Louisiana such predictability and order by deciding whether the Congress of the United States intended to impose monetary liability upon it for injuries suffered by seamen who are employees of the State of Louisiana.

Adequacy of state-law ground to support judgment precluding litigation of federal claim is itself a federal question, which the Supreme Court of the United States reviews de novo.

Howlett v. Rose, 496 U.S. 356, 100 S. Ct. 2430, 110 L.Ed.2d 332.

ARGUMENT

Plaintiff is attempting to recover against DOTD for a cause of action based on traditional admiralty remedies. DOTD maintained in the State District Court, the State Court of Appeal and the Supreme Court of Louisiana that it is immune from suits in admiralty by its employee by virtue of its status as a department of the State of Louisiana and the provisions of the Eleventh Amendment to the United States Constitution and by virtue of its Workmens Compensation Law restricting its employees to benefits under that law for injuries they sustain during the course and scope of their employment. DOTD also maintained that the limited waiver of immunity contained in Louisiana Constitution Art. 12 § (10) does not act to waive its immunity to suits based upon federal admiralty causes of action.

A) Federal-State Issues

Plaintiff has chosen to pursue traditional admiralty remedies ordinarily available to seamen who are injured while carrying out their duties. Nonetheless, when the defendant in a suit based on admiralty causes of action is a *state*, there are special legal doctrines which must be considered. First and foremost is the Eleventh Amendment to the United States Constitution, which provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The amendment has been judicially interpreted to bar a citizen from suing his own state in federal court, even though the express terms of the amendment refer only to suits by citizens of another state. *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 10 S. Ct. 504 (1890). The legal basis of the Supreme Court's expansive reading of the Eleventh Amendment to prohibit suits by a citizen of a state, against his state, in federal court, is the underlying concept of *comity between co-equal sovereigns.*

In the recent case of *Welch v. Department of Highways and Public Transportation*, 483 U.S. 468, 97 L.Ed. 389, 107 S. Ct. 2941, 1987, the Supreme Court of the United States, in a case remarkably similar to this one, discussed the operation of the Eleventh Amendment in the context of an admiralty suit, brought in federal court, by an employee of a state, to recover damages under legal theories of general maritime law and the Jones Act, *46 U.S.C. § 688*. In *Welch*, an admiralty suit was brought by an employee of the State of Texas who worked on a state owned ferryboat used to transport people and vehicles across the Houston Ship Channel. In holding that the State of Texas *could not* be sued in federal court, the Supreme Court reviewed the law which governed interpretation of the Eleventh Amendment It stated:

> The Court has recognized that the significance of the Amendment "lies in its affirmation that the funda-

mental principle of sovereign immunity limits the grant of judicial authority in Art. III" of the Constitution. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 98, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (Pennhurst II). Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State. *Hans v. Louisiana,* 134 U.S. 1, 10, 33 L. Ed. 2d 842, 10 S. Ct. 504 (1890). See *Edelman v. Jordan,* 416 U.S. 651, 662-663, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); *Employees v. Missouri Dept. of Public Health and Welfare,* 411 U.S. 279, 280, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973). *For the same reason the Court has held that the Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, "suits in law or equity." Ex parte New York, No. 1,* 256 U.S. 490, 497, 65 L. Ed. 1057, 41 S. Ct. 588 (1921) (Eleventh Amendment bars in personam actions against a State by its citizens); Ex parte New York, No. 2, 256 U.S. 503, 65 L. Ed. 1063, 41 S. Ct. 592 (1921) (*Eleventh Amendment bars actions in rem against vessel owned by the State and employed exclusively for governmental purposes*). See Florida Dept. of *State v. Treasure Salvors, Inc.,* 458 U.S. 670, 683, n 17, 73 L. Ed. 2d 1057, 102 S. Ct. 3304 (1982) (plurality opinion of Stevens, J.); id., at 706-710, 73 L. Ed. 2d 1057, 102 S. Ct. 3304.

(White, Jr., concurring in judgment in part and dissenting in part).

See *infra,* at 488-490, 97 L. Ed. 2d, at 406-407.

The Court has recognized certain exceptions to the reach of the Eleventh Amendment. If a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment. *Clark v. Barnard,* 108 U.S. 436, 447, 27 L. Ed. 780, 2 S. Ct. 878 (1883). But, because "[c]onstructive consent is not a doctrine commonly associated with

> the surrender of constitutional rights," *Edelman v. Jordan, supra,* at 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347, *the Court will find a waiver by the State "only where stated 'by the most express language or by such overwhelming implications from the test as* [will] leave no room for any other reasonable construction'." Ibid. (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 53 L. Ed. 742, 29 S. Ct. 458 (1909)). *Moreover, "[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued."* Pennhurst II, *supra,* at 99, 79 L. Ed. 2d 67, 104 S. Ct. 900 (emphasis in original). (emphasis added)

Welch, 483 U.S. at 475, 476.

The Supreme Court went on to dismiss the suit, stating:

> It is true that the Act (Jones Act) extends to "(a)ny seaman who shall suffer personal injury in the course of his employment," Section 33 (emphasis added). *But the Eleventh Amendment marks a constitutional distinction between the States and other employers of seaman.* Because of the role of the States in our federal system, (a) general authorization for suit in Federal Court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. (emphasis added)

483 U.S. at 475, 476.

The court recognized that for purposes of maritime remedies, there is a distinction between a suit against a private employer and a suit when the defendant in the action is a state. If the defendant is a state, principles governing sovereign immunity *must be applied to decide whether the state has waived its immunity.* If the state has waived its immunity, the court must decide *where and how* the state has agreed that it may be sued. *Welch* makes it clear that, if the state has not waived its immunity, it may not be sued for Jones Act or maritime claims in federal court. The U.S. District Court for the Eastern District of Louisiana has already dismissed this plaintiff's federal suit, holding that DOTD has not waived its immunity to suit.

The legal question not answered in *Welch* is whether the state's immunity to suit for maritime remedies in federal court extends to the same suit filed in state court. This issue is res nova in Louisiana. Nonetheless, other states have decided the issue and their decisions should be considered as persuasive authority.

In the case of *Estate of Rodney Morris v. Massachusetts Maritime Academy, et al*, 565 N.E.2d 422, Supreme Judicial Court of Massachusetts, the court was squarely presented with the question of whether admiralty and Jones Act claims could be brought against the State of Massachusetts by employees of the state, in a state court. The facts were surprisingly similar to those present in this case. In discussing the sovereign immunity doctrine holding in *Welch*, the court stated:

> More recently, the Supreme Court has held this immunity may be abrogated by an act of Congress. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (congressional abrogation of State immunity pursuant to commerce clause power); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (Congressional abrogation of State immunity pursuant to enforcement power of § 5 of the Fourteenth Amendment to the United States Constitution). However, the Supreme Court has stressed that, "Congress may abrogate the States' constitutionally secured immunity from suit in Federal court only by making its intention unmisakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985). The Jones Act, according to the Supreme Court, does not contain sufficiently explicit language to constitute such an abrogation. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 474-476, 107 S.Ct. 2941, 2946-2948, 97 L.Ed.2d 389 (1987).
>
> Although the Supreme Court never has addressed the question whether States may claim immunity in their own courts when the Eleventh Amendment bars

suit in Federal court, we think that, absent congressional command to the contrary, they may. The *Hans* line of cases indicates that the Constitution was ratified with the implicit assumption that States would retain their sovereign immunity. *The only logical interpretation of this implicit constitutional principle is that it must apply regardless of the court in which the State is being sued. Any conclusion to the contrary would decimate the force of the Eleventh Amendment and demote it into nothing more than a choice of forum clause: either the State must consent to be sued in Federal court or it will be unwillingly subjected to process in its own courts.* We think the Supreme Court's Eleventh Amendment jurisprudence *demonstrates a greater respect for the principle of State sovereign immunity.*

Although concerns for *Federal-State comity*—the unseemly notion of one sovereign being hauled into the courts of another—arise in many of the Eleventh Amendment cases, those federalism concerns are no less present in this type of case. Although here it is not a question of a State being hauled into the courts of another sovereign, it is a question of a State being hauled into its own courts by the laws of another sovereign. Moreover, those laws are alleged to require the payment of retrospective damage awards out of a State's coffers. If there is any area of State sovereignty which the Supreme Court is particularly hesitant to invade, it is State citizens' settled decisions about State budgetary allocations. See *Edelman v. Jordan,* 415 U.S. 641, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (Eleventh Amendment bars suit against State officers seeking retroactive as opposed to prospective monetary compensation which ultimately would be paid by the State). "It is one thing to tell [a State official] that he must comply with the federal standards for the future. . . . It is quite another thing to order [the official] to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force." *Id.*

> at 665, 94 S.Ct. at 1347, quoting *Rothstein v. Wyman,* 467 F.2d 226, 236-237 (2d Cir. 1972), *cert. denied,* 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973). If the State is to retain any sort of control over settled budgetary decisions, the Eleventh Amendment must do more than merely direct plaintiffs to a different tribunal in order to sue the State under Federal law.
>
> Although it may be clear that the supremacy clause gives Congress the power to abrogate State court immunity in its own as well as in Federal courts, cf. *Garcia v. San Antonio Metropolitan Transit Auth.,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), we think that the Supreme Court's understanding of the principles underlying the Eleventh Amendment would require Congress to use equally explicit language in both circumstances. Because the Supreme Court already has determined that the Jones Act does not abrogate State immunity in Federal courts, see *Welch, supra, we think it cannot be interpreted as abrogating State court immunity.*
>
> Decisions from other State courts, albeit before Congress's power to overcome a State's sovereign immunity was clear, support our view. See *Weppler v. School Bd. of Dade County,* 311 So.2d 409 (Fla. App.1975); *Commissioners of the Port of New Orleans v. Splendour Shipping & Enters. Co.,* 255 So.2d 869 (La.Ct.App.1971), rev'd on other grounds, 273 So.2d 19 (La.1973); *Maloney v. State of N.Y.,* 3 N.Y. 2d 356, 165 N.Y.S.2d 465, 144 N.E.2d 364 (1957); *Mossman v. Donahey,* 46 Ohio St.2d 1, 346 N.E.2d 305 (1976); *Lyons v. Texas A. & M. Univ.,* 545 S.2.2d 56 (Tex.Ct.Civ.App.1976); *Gross v. Washington State Ferries,* 59 Wash.2d 241, 367 P.2d 600 (1961).

The Court went on to state:

> We therefore hold that the commonwealth is entitled to immunity from this admiralty law action in state as well as federal court.

Morris, 565 N.E.2d at 425, 426, 427.

The court went on to find that the state had nonetheless waived its immunity by virtue of its legislative enactment of the Massachusetts Tort Claims Act, a comprehensive waiver of the states sovereign immunity. The Louisiana Court of Appeal's, opinion below affirming the decision of the trial court fails to address the concerns discussed in *Morris.*

The decision of the Court of Appeal renders the Eleventh Amendment of the Constitution a simple choice of forums statute. The concerns discussed in *Morris* are the same as those that this court should apply in this case to find that this suit could not be brought in a Louisiana State District Court and that the DOTD's exception should have been granted. The state has not waived its sovereign immunity to admiralty suits brought against it, and unlike Massachusetts, has not enacted a comprehensive tort claims act which could be construed so as to act as a waiver of that immunity.

B) Questions of Sovereignty

Louisiana's Constitution, Article 12, Section 10 provides the following:

> Section 10. *(A) No Immunity in Contract and Tort.* Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> *(B) Waiver in Other Suits.* The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.
>
> *(C) Procedure; Judgments.* The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

The provision authorizes suits against the state, but the authorization has been limited by judicial interpretation to the limited nature of the waiver.

In *Sibley v. Board of Supervisors of Louisiana State University*, 446 So.2d 760, La.App. 1st Cir., 1983, appears the following:

> "While there may remain questions as to how far Section 10 (A) goes in abolishing sovereign immunity in Louisiana, at least within the literal units of the language, Section 10 (A) merely places the state in the same position as any other defendant. It is only when the state attempts to limit its liability on the basis of its status as a sovereign that it violates section 10(A). Thus, to the extent the legislature may constitutionally limit the liability of any defendant, that same limitation applied to the state is not unconstitutional."

Sibley, 446 So.2d at 767.

Later, in the same case on appeal to the Louisiana Supreme Court, *Sibley v. Board of Supervisors*, 462 So.2d 149 (La. 1985) (Sibley II), the court makes the following observation:

> "Transcripts from the 1973 Constitutional Convention indicate that the original provision tracking that of Article III, Section 35 of the 1921 Constitution, required legislative authorization before a lawsuit could be initiated against the State, its agencies or political subdivisions. Eight different amendments, however, each including the concept of a waiver or abolition of sovereign immunity, were offered in opposition to the committee proposal *and rejected. On the ninth attempt, the delegates approved a limited waiver of Sovereign immunity,* a compromise which now comprises Article XII, Section 10 of the Louisiana Constitution. (emphasis added)

Sibley II, 462 So.2d at 154.

It is clear that the waiver contained in Article XII Section 10 is a limited one and that the State *has not waived all of its immunity to suit.* The federal court, in a com-

panion suit brought by plaintiff, has already ruled that DOTD has not waived its immunity. *Welch, supra*, provides that absent a clear congressional intent, the states have the ability to designate *if and where* a plaintiff may bring suit. The Court of Appeal, in affirming the trial court's denial of the Exception of No Cause of Action stated the following:

> As for DOTD's assertion that Cosey is restricted to workers' compensation benefits, *the Louisiana Legislature did not grant Cosey the cause of action he pursues. Rather, federal law provides him the remedies he seeks. The state may dictate the court in which he is entitled to litigate his claims, but it cannot limit the remedies afforded him by federal law under the savings to suitors clause.* (emphasis added)

The ruling is inconsistent with the reasoning contained in *Sibley* in that it finds that Art. XII § 10 *is a complete waiver* of immunity to the federal cause of action. *Sibley II* and the transcripts of the Constitutional Convention eluded to in *Sibley II* expressly hold that the waiver contained in Art. XII § 10 is limited. When considered in conjunction with the reasoning in *Welch* and *Morris, supra*, it is clear that the state has *not* waived its immunity to causes of action based upon traditional maritime remedies. The Court of Appeal ruling is in error and should be reversed.

As an additional aside and in support of the contention that Art. XII § 10 (A) did not waive Louisiana's immunity to federal maritime claims, DOTD would note that the legislature has specifically provided for claims such as those in this case. In Louisiana, given the facts of this case, that is, of an employee of the state bringing suit for injuries received while within the course and scope of his employment, the state, and the people of the state, have designated the Office of Worker's Compensation as the proper forum to seek redress for injuries to its employees received while on the job.

C) Workers' Compensation and Jurisdictional Concerns

Louisiana has adopted a comprehensive scheme by which the state has designated as the sole remedy available for state employees who are injured on the job are those benefits under the Workers Compensation Act, LSA-R.S. 23:1021 *et seq.* Specifically, LSA-R.S. 23:1034 provides:

> A. The provisions of this Chapter shall apply to every person in the *service of the state or a political subdivision thereof,* or of any incorporated public board or commission authorized to hold property and to sue and be sued, under any appointment or contract of hire, express or implied, oral or written, except an official of the state or a political subdivision thereof or of any such incorporated public board or commission; *and for such employee and employer the payment of compensation according to and under the terms, conditions, and provisions set out in this Chapter shall be exclusive, compulsory, and obligatory;* provided that one employed by a contractor who has contracted with the state or other political subdivision, or incorporated public board or commission through its proper representative, shall not be considered an employee of the state, or another political subdivision, or incorporated public board or commission; further, provided that members of the police department, or municipal employees performing police services for any municipality who are not elected officials shall be covered by this Chapter and shall be eligible for compensation; and provided further that criminal deputy sheriffs for the parish of Orleans shall be covered by this Chapter and shall be eligible for compensation as provided herein.
>
> . . . .
>
> D. Employees of the state, but not those of political subdivisions, shall be provided compensation under this Section by the office of risk management of the Division of Administration in accordance with R.S. 39:1527, et seq. *For purposes of this Section, "employees of the state" means the employees of "state agencies" as defined by R.S. 39:1527(1).* Employees

> of political subdivisions shall be provided compensation under this Section by the governing authorities of their respective political subdivisions. The fact that the state may grant to an employee of a political subdivision any additional or supplemental pay or otherwise provide funds for the payment of such employee's salary shall not make such employee, in whole or in part or in any way, an employee of the state. (emphasis added)

Prior to November 7, 1990, jurisdiction to hear suits for Worker's Compensation benefits, brought by employees of the state who were injured while within the course and scope of their employment, was vested in the district courts of the state. (See prior LSA-R.S. 23:1312). *Nonetheless, in an election held on October 6, 1990, the electorate of the State of Louisiana removed from the Louisiana District Courts any jurisdiction to hear suits brought by state employees injured while within the course and scope of their employment.*

On October 6, 1990, the voters of Louisiana approved Acts of the Louisiana Legislature, 1990, No. 1098, amending Louisiana's Constitution Art. 5 Sections 10(A), (B) and 16 (A). The language of the Act, voted on by the people of Louisiana, provided:

> Section 3. Be it further resolved that on the official ballot to be used at said election there shall be printed a proposition, upon which the electors of the state shall be permitted to vote FOR or AGAINST, to amend the Constitution of Louisiana, which proposition shall read as follows:
>
> "To provide that the trial of worker's compensation cases may be decided by administrative hearing officers, *rather than the district court*, that appeals from administrative agency decisions on worker's compensation cases shall be heard by the courts of appeal, *and to validate such processes already in operation pursuant to law.* (Amends Article V, Sections 10(A) and 16(A))". (emphasis added)

By passage of the amendment, the people of Louisiana have removed any question that, *as to suits by employees*

of the state, against the state, for injuries received while within the course and scope of their employment, the Louisiana State District Courts have no jurisdiction. Welch, supra, as previously stated, allows a state to designate *if and where* it may be sued. The electorate of Louisiana has so designated: as to its employees who are injured while on the job, that place is the Office of Workers' Compensation and the remedy is for benefits under the Act.

DOTD would note that relegating plaintiff to remedies of Workers' Compensation would be consistent with the result the Federal courts have reached in handling a similar claim. In *Johansen v. United States*, 343 U.S. 427, 72 S. Ct. 849, 1952, the Supreme Court of the United States was called on to decide whether one of its employees, a seamen who was injured while employed on a public vessel owned by the United States, could recover traditional seamen's remedies, under the Public Vessels Act, or was his sole remedy for compensation benefits under the Federal Employee's Compensation Act. (FECA) In finding that the employee could only bring his action for benefits under FECA, the court distinguished the remedies which would be available for a *private individual*, injured on a public vessel owned by the United States, and the remedies aavilable for a *public employee*, injured on the same vessel. In *Johansen*, the court stated:

> We have already held that this Act grants consent to be sued for personal injuries suffered by an individual not employed by the United States, caused by the negligent maintenance or operation of a public vessel of the United States. *American Stevedores, Inc. v. Porello,* 330 U.S. 446, 67 S.Ct. 847, 91 L.Ed. 1011, cf. *Canadian Aviator, Ltd. v. United States,* 324 U.S. 215, 65 S.Ct. 639, 89 L.Ed. 901. If the congressional purpose was to allow damages for personal injuries sustained by federal employees while in the performance of duty, the literal language of the Act would allow actions of the nature of those before us.

This general language, however, must be read in the light of the central purpose of the Act, as derived from the legislative history of the Act and the surrounding circumstances of its enactment. The history of the Act has already been set forth in some detail in the Porello and Canadian Aviator cases cited above. It is sufficient here to recall that this Act was one of a number of statutes which attest to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage. 330 U.S., at page 453, 67 S.Ct. at page 951. These enactments were not usually directed toward cases where the United States had already put aside its sovereign armor, granting relief in other forms. With such a legislative history, one hesitates to reach a conclusion as to the meaning of the Act by adoption of a possible interpretation through a literal application of the words. Nor is the legislative history of the Act helpful. We are cited to no evidence that any member of Congress in 1925 contemplated that this Act might be thought to confer additional rights on claimants entitled to the benefits of the Federal Employees Compensation Act of 1916. Surely the lack of such evidence is not helpful to petitioners' case; the most that can be said of it is that Congress did not specifically exclude such claimants from the coverage of the Public Vessels Act.

Under these circumstances, it is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. *Feres v. United States*, 340 U.S. 135, 139, S.Ct. 153, 156, 95 L.Ed. 152. It is important, then, to examine briefly the other statutes which are a part of the system of remedies against the government available to seamen for personal injuries.

In 1916 Congress passed both the Shipping Acts. 39 U.S.C. 728, 46 U.S.C.A. § 801 et seq., and Federal Employees Compensation Act. The former sub-

jected Government vessels, employed solely as merchant vessels, to all laws, regulations and liabilities governing private merchant vessels if they were purchased, chartered, or leased from the shipping Board. Thus a remedy for damages for personal injuries was given to merchant seamen on ship in which the Government had an interest, but not to public vessel seamen. Cf. *The G.A. Flagg,* D.C., 256 F. 852.

In the latter Act Congress undertook to provide a comprehensive compensation system for federal employees who sustain injuries in the performance of their duty. The payment of this compensation, subject to the provisions of the Act, is mandatory, for § 1 provides: 'That the United States Retirement Act, and other similar acts. The Act thus gave effect to a congressional purpose to treat seamen employed through the War Shipping Administration as 'merchant seamen,' not as 'public vessel seamen.' See *Cosmopolitan Shipping Co. v. Mcallister,* 337 U.S. 783, 792, 69 S.Ct. 1317, 1322, 93 L.Ed. 1692, quoting from H.R.Rep. No. 107, 78th Cong., 1st Sess. The Act did not purport to change the status of public vessel seamen not employed through the War Shipping Administration.

This was the situation prior to the 1949 amendments to the Federal Employees Compensation Act. Merchant seamen, other than those employed by the War Shipping Administration, on ships owned by the United States had a right to libel the United States pursuant to the suits in Admiralty Act of 1920, but whether they were entitled to the benefits of the Compensation Act was doubtful. See Comptroller General's Decision A—31684, Sept. 10, 1930; 34 Op.Atty.Gen. 363; *Johnson v. United States Shipping Board Emergency Fleet Corporation,* 280 U.S. 320, 50 S.Ct. 188, 74 L.Ed. 451. Seamen employed through the War Shipping Administration were by the Clarification Act to be treated as merchant seamen, whether they were serving on merchant vessels or public vessels. As public-vessel seamen injured other than in the course of duty are not covered by the Compensation Act they would pre-

> sumably have had the same rights to recovery as the public generally under the Public Vessels Act. *Public-vessel seamen injured in the course of duty were entitled to all the benefits of the Federal Employees Compensation Act. The issue in this case is whether this last group of Government-employed seamen is eligible under both schemes of recovery.* (emphasis added)

Johansen, 343 U.S. at 431.

After a discussion of the history of the adoption of the comprehensive scheme of recovery provided by the FECA, the court held that, as to public employees employed on public vessels, the exclusive remedy was for benefits under the Act. The court added:

> Had Congress intended to give a crew member on a public vessel a right of recovery for damages against the Government beyond the rights granted other Government employees on the same vessel under other plans for compensation, we think that this advantage would have been specifically provided.

Johansen, 343 U.S. at 439.

In Louisiana, in this case, the analysis and result should be the same. Plaintiff was employed on a *public vessel, owned by the State of Louisiana, which has enacted a comprehensive scheme whereby its employees who are injured on the job are to recover benefits under its Workers' Compensation Act.*

Had the State of Louisiana intended to make more than one remedy available to the employees similarly situated as plaintiff in this case it could have done so. It did not, and the Court of Appeal's refusal to reverse the decision of the trial court and grant DOTD's exception, relegating plaintiff to his proceedings in the Office of Workers' Compensation, was error which this court should reverse.

If the decision is allowed to stand, the trial court will have gained jurisdiction to hear a claim which the people of Louisiana have decided should be relegated to an administrative process. Simply by the chance circumstance of plaintiff being employed on a ferryboat, the

trial court would have gained jurisdiction to hear a case which it would not otherwise be entitled to hear. The decision to overrule DOTD's exception failed to recognize the difference between private employees, who have access to traditional seamen's remedies, and public employees employed on public vessels for a public purpose. The decision also grants to plaintiff a remedy which is unavailable to other state employees not fortunate enough to work on a ferryboat. The decision was error which should be reversed.

As an aside, and in the interest of completeness, DOTD notes that plaintiff's claims against Captain Bussey are also barred from being heard in District Court. Captain Bussey is a co-employee of plaintiff. The Louisiana Workers' Compensation Act bars actions by a plaintiff for injuries received as a result of the non-intentional conduct of a co-employee. In LSA-R.S. 23:1032 appears the following relevant provisions:

> A. (1)(a) *The rights and remedies* herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.
>
> (b) This exclusion remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner *or employee of such employer* or principal under any dual capacity theory or doctrine. (emphasis added)

Defendants' exception should have been granted, and plaintiffs action against Captain Bussey dismissed.

D) Statutory Construction Considerations

The Court of Appeal, in its decision, reasoned that to find for the position of the DOTD would result in plaintiff having no remedy at all. The Court of Appeal found

that the provision of LSA-R.S. 23:1035.2 would prevent plaintiff from any recovery under the Workers Compensation Scheme. The Court of Appeal stated:

> As for DOTD's assertion that Cosey is restricted to workers' compensation benefits, the Louisiana Legislature did not grant Cosey the cause of action he pursues. Rather, federal law provides him the remedies he seeks. The state may dictate the court in which he is entitled to litigate his claims, but it cannot limit the remedies afforded him by federal law under the savings to suitors clause.
>
> Moreover, La. R.S. 23:1035.2 provides:
>
> > No compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Worker's Compensation Act, or any of its extensions, or the Jones Act.
>
> Thus, Louisiana Workers Compensation and the Jones Act remedies are mutually exclusive, which lends support to Cosey's argument that he can bring a Jones Act claim against his employer in a state court.
>
> Finally, if Cosey is "covered" by the Jones Act, within the meaning of 23:1035.2 above, but denied the right to proceed in federal court by the Eleventh Amendment, and unable to claim Jones Act remedies in state court because of sovereign immunity, then Cosey has neither a remedy nor a forum in which to pursue a remedy. Clearly, this is not the intent of the law.

In the finding, the Court of Appeal was clearly in error. DOTD maintains that a proper reading of LSA-R.S. 23:1035.2 when read in conjunction with other provisions contained in the Workers Compensation Act, specifically LSA-R.S. 23:1034, does not result in plaintiff being excluded from benefits. LSA-R.S. 23:1035.2 provides:

> No compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshore-

men's and Harbor Worker's Compensation Act, or any of its extensions, or the Jones Act.

The statute was added by Louisiana Acts 1989, No. 454 Section 2, effective January 1, 1990. The provision, on its face, if applied literally, simply means that if the person claiming benefits can recover under any of the provisions listed, *he may not recover benefits* under this Act. The statute is one that limits the liability of an employer to only one remedy and prevents "double dipping". It does not say that state employees, (whom DOTD maintains *may not recover* under any of the provisions listed), injured while within the course and scope of their employment, may receive additional benefits. In fact, such a reading of the statute could "gut" the sole remedy provisions of LSA-R.S. 23:1032 for any state employee whose position happens to be jointly funded by the state and federal government; by state employees employed in an inspection of cargo vessels on the Mississippi River; for ferryboat personnel; and for a variety of other state personnel who might fit under one of the other provisions. The law's apparent purpose is to *limit* the recovery of an employee to *one* of the remedies by preventing "double dipping", not to expand the remedies available to an employee.

In this case, the effect of the Louisiana Court of Appeal's finding is that LSA-R.S. 23:1035.2 prevents plaintiff (or those similarly situated from recovering compensation. In effect, the court's ruling is that the adoption of LSA-R.S. 23:1035.2 *repealed* the provision of LSA-R.S. 23:1034 relegating all state employees to benefits under the Act.

LSA-R.S. 23:1035.2 was enacted by the legislature in Acts 1989, No. 454 Sec. 2, to be effective January 1, 1990. It is presumed that the legislature knew that the Worwer's Compensation Act relegated *all* state employees who are injured while within the course and scope of their employment to a claim for benefits under the act. Had the legislature intended that LSA-R.S. 23:1035.2 *expand* the remedies available to some state employees, it could have stated so. In addition, LSA-R.S. 23:1035.2

was passed just before the enactment of Louisiana Acts 1990, No. 1098 to amend Louisiana's Constitution Article 5 Sections 10 (A), (B) and 16 (A). It would be unusual for the legislature to, first, grant a right to some of its state employees to bring an action for maritime damages in Louisiana's District Courts, and then close those same courts to any claim brought on behalf of the same state employee. Such a reading of the statutes would be tortured, at best. The Court of Appeal's finding was error which should be reversed.

Gulf Oil Corp. v. State Mineral Board, 317 So.2d 576, on rehearing (La. 1975); *City of New Orleans v. Board of Supervisors,* 43 So.2d 237 (La. 1949) and *Hayden v. Richland Parish School Board,* 554 So.2d 164 (La.App. 2nd Cir., *writ denied,* 559 So.2d 124 (La. 1990), all require that the court attempt to harmonize the two statutes so that sense can be made of the entire statutory scheme. DOTD maintains that the proper reading of LSA-R.S. 23:1034 and 23:1035.2 which reconciles and gives effect to both statutes in a meaningful way is the reading that this Court gave in *Johansen.* Statutes governing Workers' Compensation must be read *in pari materia, Soulier v. Raymond,* 477 So.2d 651, La.App. 4th Cir., 1965. LSA-R.S. 23:1034 refers specifically to *state employees.* Just as this Court found in *Johansen,* supra, a proper reading of the two statutes would apply LSA-R.S. 23:1034 to all *public employees,* while applying LSA-R.S. 23:1035.2 only to *private employees.* LSA-R.S. 23:1034 is a specific statute which applies only to state employees. LSA-R.S. 23:1035.2 applies to all employees as a class. In deciding the issue the court should consider that the party who contends that he comes within an exception to the general rule established by statutes must prove it. *Testa Distributing Co., Inc. v. Tarver,* 584 So.2d 300, La.App. 1st Cir. 1991. The two statutes are not inconsistent if read to apply to differing classes of employees, one private and the other, the State of Louisiana.

Plaintiff is a state employee injured while within the course and scope of his employment. To allow him to

recover seamen's remedies would grant to him a remedy which is not available to other state employees. As a state employee he is relegated to Workers' Compensation Benefits for the State has not waived its immunity to be sued for any benefits as a result of injuries sustained by an employee within the scope of their employment, other than those allowed under the Workmen's Compensation Act.

E) "Savings to Suitors" Clause Concerns

The Court of Appeal, throughout its opinion relies on the "Savings to Suitors" clause of 28 U.S.C.A. § 1333 and 46 U.S.C. 688 to find that plaintiff may bring his *federal claim* in a state court. In relying on that clause, in this case, the Court of Appeal has erred. 46 U.S.C. 688, known as the Jones Act, provides in part;

> (a) Application of railway employee statutes; jurisdiction
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the *common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury* the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

28 U.S.C.A. § 1333, an extension of the first Judiciary Act of 1789, provides the following:

> [T]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which*

> *they are otherwise entitled.* (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. (emphasis added)

The purpose of the "savings to suitors" clause of 28 U.S.C.A. § 1333 was to "save" those common law remedies which were available *prior* to the passage of the Judiciary Act in 1789.

When a state entertains a suit based upon admiralty, it is bound to apply the *federal law.* In *Garrat v. Moore-McCormack Co., Inc.,* 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed 239 the United States Supreme Court considered an admiralty case which was tried under the "savings to suitors" clause in a Pennsylvania State Court. In *Garrett* the plaintiff had filed suit in a Pennsylvania State Court alleging a right to recover pursuant to the Jones Act and for Maintenance and Cure. The defense to the claim included plaintiff's execution of a release in return for $100.00. Pennsylvania law differed from federal law on the burden of proof, and upon whom that burden would fall. The trial court found for plaintiff. The Pennsylvania Appellate Court reversed the trial court, applying Pennsylvania law and found that plaintiff had failed to meet his burden of proof. The Pennsylvania Supreme Court reversed, finding that the court was bound to apply federal law when entertaining admiralty claims. The defendants applied to the U.S. Supreme Court to decide the issue.

In deciding that the Pennsylvania court was *bound* to apply the federal law on the issue, the court stated:

> "So here, in trying this case the State court was bound to proced in such manner that all substituted rights of the parties under controlling federal law would be protected."

Later, the court stated:

> "Pennsylvania *having opened its courts to petitioner* to enforce federally created rights, the petitioner was entitled to the benefit of the full scope of those rights." (emphasis added)

Garratt, 317 U.S. at 248, 63 S.Ct. at 252.

As was shown in *Garrett*, when a State opens its courts to a federal suit under the "savings to suitors" clause, the state court is bound to follow the law as announced in federal court.

In this case, the federal courts have found that the State of Louisiana has not waived its immunity to suit based upon federal admiralty claims. In overruling DOTD's exceptions, the trial court and the Fourth Circuit Court of Appeal of Louisiana have failed to apply the legal ruling announced in the federal courts.

In addition, it should be noted that the "savings to suitors" clause of 28 U.S.C.A. § 1333 was not originally intended to grant to plaintiffs additional rights which they did not already have in state court, but was simply to preserve state remedies which were present prior to the adoption of the Judiciary Act of 1789. Prior to the adoption of that act, personal injury actions arising in a maritime setting could be brought in a state court, with a right to trial by jury. In an accident of history, claims brought in federal court under admiralty jurisdiction were tried to the "admiralty side" without the right to trial by jury. The "savings to suitors" clause was intended to preserve a claimants right to proceed in state court, with a trial by jury, if he so desired. See *Bergeron v. Quality Shipyards, Inc.*, 765 F.Supp. 321, E.D. La. 1991 and *Pacific Far East Lines, Inc. v. Ogden Corp.*, 425 F.Supp. 1239, D.C. Cal. 1977.

At the time of the adoption of the Judiciary Act of 1789, now, 28 U.S.C.A. § 1333, Louisiana was neither a part of the United States nor a "common law" state which provided for trial by jury. At the time of the adoption of the Jones Act, 46 U.S.C. 688, on June 5, 1920, extending FELA remedies to seamen, the state of Louisiana *did not recognize a right to be sued in its own courts for maritime damages sustained on board of one of its vessels.*

In 1920, the State of Louisiana was operating its government under the Louisiana Constitution of 1913. The

provision governing suits against the state was Louisiana Constitution 1913 Art. 192. Art. 192 provided that suits against the state had to be authorized by the General Assembly. The provision codified the legal doctrine of "sovereign immunity". In providing for sovereign immunity at the time of the adoption of the Jones Act, the "savings to suitors" clause did not act to "save" anything for a plaintiff in the circumstances present in this case. In 1920, a plaintiff in Mr. Cosey's position, i.e., a state employee, was relegated to workers compensation for an injury sustained while within the course and scope of his employment. (See Louisiana Acts 1914, No. 20 § 1(1).).

Mr. Cosey is a state employee. He was injured while within the course and scope of his employment. At the time of the adoption of the Jones Act, the Louisiana Constitution provided that suits against the state were not allowed unless specifically authorized. The "savings to suitors" clause was intended to save state remedies which were available, *not to extend* federal maritime remedies to suits against a state. The "savings to suitors" clause did not "save" a right to sue the State of Louisiana for maritime injuries received on a state owned ferry. In fact, the "savings to suitors" clause as applied in this situation, simply preserved the right to proceed for a claim for workers compensation. The "savings to suitors" clause allows a state court to hear a federal maritime or Jones Act claim, but also requires that, as to admiralty claims, the state court apply federal law. The federal law, in this case, is that the state has not waived its sovereign immunity. The Louisiana trial and appellate court's failure to grant DOTD's Exception of No Cause was error which this court should reverse, relegating plaintiff to his claim for workers compensation.

CONCLUSION

Plaintiff is an employee of the State who was allegedly injured while within the course and scope of his employment. Plaintiff filed three suits, one in federal court claiming a right to recover traditional maritime damages, one in State District Court for the Parish of Orleans,

again claiming a right to recover traditional maritime damages, and one at the Louisiana Office of Workers' Compensation for benefits. The federal suit was dismissed, with the court finding that DOTD had not waived its sovereign immunity to suit in federal court. *Welch*, supra, provides that a state has a right to say *if* (i.e. immunity), and *where*, (i.e. jurisdiction) a claim may be brought. Louisiana has provided that the exclusive remedy for its employees who are injured while within the course and scope of their employment is a claim for workers' Compensation benefits. There is a distinction between *private employees*, who may sue their employers in state court for traditional maritime damages, and *State employees* whom the legislature has decided have only a claim for benefits. The people of Louisiana decided that, as to State employees injured within the course and scope of their employment, the State District Courts have no jurisdiction. Just as this Honorable Court found in *Johansen, supra*, public employees are subject to a comprehensive scheme which provides benefits to them for injuries they sustained while within the course and scope of their employment. Plaintiff has no cause of action for maritime damages against DOTD, Captain Bussey or the M/V Frank Armiger. Louisiana State District Courts should not be able to gain jurisdiction to hear a claim which they would not ordinarily be able to hear, simply because the claimant happens to work on a ferryboat. The Louisiana State District Court's refusal to grant the Exception of No Cause of Action relegating plaintiff to his claim for benefits from the Office of Workers' Compensation, and the Louisiana Court of Appeal's affirming of that decision, was error which this court should, in exercise of Its supervisory jurisdiction, reverse dismissing plaintiff's suit at his costs.

WHEREFORE, defendants/relators pray that this Honorable Court exercise Its supervisory jurisdiction and grant their petition for Writ of Certiorari and reverse the decision of the Louisiana State District Court and Court of Appeal, dismissing plaintiff's suit, at plaintff's costs.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT
OF THE STATE OF LOUISIANA

No. 93-CC-0723

JOHN COSEY

VS.

DEPARTMENT OF TRANSPORTATION AND
DEVELOPMENT ET AL.

IN RE: Transportation & Dev. Dept. of;—Defendant(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number 92CW-2619; Parish of Orleans Civil District Court Div. "I" Number 92-5913

April 30, 1993

Denied.

PH
PFC
WFM
JLD
JCW
HTL
CDK

ORTIQUE, J., not on panel.

Supreme Court of Louisiana
April 30, 1993

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

APPENDIX B

No. 92-C-2619

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

JOHN COSEY

versus

DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT *et al.*

In Re:	DOTD
Applying for:	Supervisory Writs
Directed to:	Civil District Court for the Parish of Orleans, Honorable Bernette J. Johnson, Judge, Division "T," C.C.C. #92-05913

Writs were granted to review a trial court judgment denying the Department of Transportation and Development's exception of no cause of action. After response and memorandum, we now affirm the trial court judgment. The issue presented is whether a state employee, injured in the course and scope of his employment on a state-owned ferry, may seek redress in state court for his injuries under general maritime law and the Jones Act.

Respondent, John Cosey, was employed by the State as an oiler aboard the M/V FRANK X. ARMINGER, a DOTD ferry used to transport people and vehicles across the Mississippi River. As the ferry was docking, Respondent "lost his balance and injured his back while attempting to regain his balance." Respondent sued the DOTD, the vessel and the captain of the vessel in state

court under general maritime and Jones Act theories of recovery.[1]

The State opposed Cosey's state court action by an exception of no cause of action, maintaining "that it is immune from suits in admiralty by virtue of its status as a department of the State of Louisiana and the provisions of the Eleventh Amendment to the United States Constitution." Additionally, DOTD maintains Cosey is relegated to the provisions of the state workers compensation statutes to satisfy his injury claims.

The State confuses remedies under the law with the forum in which those remedies may be brought.

The Eleventh Amendment provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The amendment has been judicially interpreted to bar a citizen from suing his own state in federal court, even though the express terms of the amendment refer only to suit by citizens of another state. *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed 842, 10 S.Ct. 504 (1890). Although the amendment bars a state from being hauled into federal court on a cause of action, it places no restrictions on the remedies which a citizen may urge against the state. While the State is immune from *suit* in federal court, this immunity does not encompass an immunity

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[1] Cosey actually filed three suits: one in the U.S. District Court under general maritime law and the Jones Act, naming as defendants, the State, the vessel and the vessel captain. The District Court dismissed the suit on a finding that the state had not waived its immunity to suit under the Eleventh Amendment to the U.S. Constitution; the second, is the suit in state court; and the third, a claim for workers' compensation benefits with the Office of Workers Compensation, which is pending.

from a cause of action in Admiralty under maritime law, the savings to suitors clause, or the Jones Act. The Eleventh amendment to the U.S. Constitution does not give DOTD immunity from admiralty claims in state court.

In maritime law and under the Jones Act, an employee can bring suit against his employer, and an employee may pursue that right in state courts under the savings to suitors clause. When an employee sues in state courts, he does not lose the right to sue his employer under maritime law. The only difference here is that the employer is a state agency.

The DOTD misconstrues Section 10(A) of Article 12 of the Louisiana Constitution which says:

> § 10. Suits Against the State
>
> Section 10. (A) No immunity in Contract and Tort.
>
> Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

This provision does not support DOTD's argument. Rather it supports Cosey's claim which, while under maritime law, is one for injury to his person. If DOTD is not immune from suit, there is no reason to believe Cosey cannot bring a Jones Act claim against his employer, DOTD.

As for DOTD's assertion that Cosey is restricted to workers' compensation benefits, the Louisiana Legislature did not grant Cosey the cause of action he pursues. Rather, federal law provides him the remedies he seeks. The state may dictate the court in which he is entitled to litigate his claims, but it cannot limit the remedies afforded him by federal law under the savings to suitors clause.

Moreover, La. R.S. 23:1035.2 provides:

> No compensation shall be payable in respect to the disability or death of any employee covered by the

> Federal Employer's Liability Act, the Longshoremen's and Harbor Worker's Compensation Act, or any of its extensions, or the Jones Act.

Thus, Louisiana Workers Compensation and the Jones Act remedies are mutually exclusive, which lends support to Cosey's argument that he can bring a Jones Act claim against his employer in a state court.

Finally, if Cosey is "covered" by the Jones Act, within the meaning of 23:1035.2 above, but denied the right to proceed in federal court by the Eleventh Amendment, and unable to claim Jones Act remedies in state court because of sovereign immunity, then Cosey has neither a remedy nor a forum in which to pursue a remedy. Clearly, this is not the intent of the law.

We find no error in the lower court's ruling on DOTD's exception.

New Orleans, Louisiana this 17th day of February, 1993.

/s/ Charles R. Ward
JUDGE CHARLES R. WARD

/s/ Dennis A. Barry
JUDGE DENNIS A. BARRY

/s/ Charles R. Jones
JUDGE CHARLES R. JONES

APPENDIX C

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

No. 92-5913
DIVISION "I"

JOHN COSEY

versus

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
M/V FRANK X. ARMIGER, CAPTAIN HENRY BUSSEY,
AND ABC INSURANCE COMPANY

JUDGMENT

This cause came on for hearing on October 23, 1992, upon a peremptory exception of no cause of action, defendant to strike attorney fees.

Present: Stephen J. Caire, Esq. Attorney for Defendants,
Mover E. Howard McCaleb III, Attorney for
Plaintiff, Respondent

And, thereupon, the mover having filed a peremptory exception of no cause of action, and the exception having been argued and submitted; the Court considering that the exception is not well founded, for the reasons orally assigned:

IT IS ORDERED that the exception of no cause of action be, and it is, overruled and dismissed, defendants to answer the pleadings within ten days.

New Orleans, Louisiana, this 23rd day of October, 1992.

/s/ Hon. Bernette J. Johnson
Judge

APPENDIX D

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

Number: 92-05913 "I"

JOHN COSEY

versus

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, M/V FRANK X. ARMIGER, CAPTAIN HENRY BUSSEY, AND ABC INSURANCE COMPANY

EXCEPTION OF NO CAUSE OF ACTION

NOW INTO COURT, through undersigned counsel, comes defendants, the Louisiana Department of Transportation and Development, M/V Frank X. Armiger, and Captain Henry Bussey, who, through their undersigned counsel, hereby except to the petition of the plaintiff on the grounds that it fails to state a cause of action for which redress would be possible.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General

By: _____

STEPHEN J. CAIRE
SPECIAL ASSISTANT ATTORNEY GENERAL
REED & CAIRE
ATTORNEYS AT LAW
71206 Hendry Avenue
Covington, LA 70433
(504) 892-9295

APPENDIX E

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

No. 92-5913 "I"

JOHN COSEY

versus

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, M/V FRANK X. ARMIGER, CAPTAIN HENRY BUSSEY, AND ABC INSURANCE COMPANY

ADMIRALTY AND MARITIME CLAIM

SEAMAN'S SUIT

COMPLAINT

COUNT I

Plaintiff, John Cosey, domiciled in the Parish of Saint Charles, is a seaman under the special rules allowing seaman to file suit without prepayment of costs and fees, under the general maritime law for unseaworthiness, and under the congressionally created Jones Act, respectfully represents:

1. Defendant, Department of Transportation and Development (DOTD), is a body corporate with the power to sue and be sued, domiciled in Baton Rouge, while the defendant, M/V Frank X. Armiger, is a ferry boat owned and operated by the DOTD, located in its Crescent City Connection Division, and under the DOTD's advisory agency, the Mississippi River Bridge Authority. Defendant, Captain Henry Bussey, is domiciled in this parish, while defendant, ABC Insurance Company, is a foreign Insurance company.

2. At all times material times, plaintiff was employed as a member of the crew of M/V Frank X. Armiger, in the position of Marine Oiler.

3. Defendant, DOTD, was under a duty to maintain the M/V Frank X. Armiger and its appurtenances in a safe and seaworthy condition. At all times material times, there was in force an Act of Congress known as the Merchant Marine Act commonly known as the Jones Act, and due to plaintiff's employment aboard the said vessel, he is entitled to maintain this action against DOTD under the provisions of the Act.

4. On May 14, 1991, plaintiff suffered injuries to his person in the course of his employment abroad the vessel. The occurrence was due to DOTD's failure to maintain the vessel and is appurtenances in a seaworthy condition, causing the rudder to jam on the day of the accident, and failing to provide plaintiff with a safe place to work by reason of DOTD's master negligently continuing to operate the vessel with the defective steering apparatus, making a hard landing, striking the pier with such force and violence that plaintiff lost his balance and injured his back trying to regain it.

5. As a result of the accident, plaintiff sustained severe pain, permanent injuries, is incapacitated from performing his duties as Marine Oiler, suffered loss earnings, mental distress, and has incurred obligations for medical services, which will continue into the future.

6. Defendant, Captain Henry Bussey, is a Marine Master 2, who at the time of the accident had the con of the vessel and negligently rammed it into the pier as aforesaid, resulting in the injuries to plaintiff.

7. At all material times, DOTD had a liability insurance policy with ABC Insurance Co. which covered DOTD for its negligent acts and those of its employees.

8. Plaintiff seeks an award of prejudgment interest from the date of the accident, and demands a jury under the Jones Act.

COUNT II

9. Defendant, DOTD, was and still is the owner of the aforesaid vessel, which at the time of the accident herein

could be found and can still be found within the Port of New Orleans, within the territorial jurisdiction of the United States and this court. Plaintiff was employed aboard her on May 14, 1991, on navigable waters of the United States.

10. At the time of the accident, plaintiff was going about his duties as a seaman by assisting—in mooring the vessel. He was standing at the Oiler's work station on the bow of the ferry boat.

11. The accident and resulting injury was caused by the unseaworthiness of M V Frank X. Armiger in that the gear and appurtenances of the vessel were unsafe and unfit for the purpose intended.

12. That prior to his injury plaintiff was a strong abled bodied seaman gainfully employed as such and capable of earning in excess of $250 per week. As a result of his injury, plaintiff is disable, unable to do any work of a seaman, continues to suffer physical and mental agony, and is unable to support either himself or his family.

COUNT III

12. Plaintiff is a seaman under the special rules allowing seamen to file suit without prepayment of costs and fees, or giving security therefore for maintenance, damages for failure to pay maintenance an cure, and for attorney fees.

13. Defendant, DOTD, has the duty to provide plaintiff with maintenance and cure during the period of his disability. Plaintiff is entitled to recover from DOTD the money he has expended for cure in the past, present and future.

14. In the event DOTD's failure or refusal to pay his maintenance and cure is found to be arbitrary or unjustified, plaintiff reserves his rights to seek damages and attorney fees therefor.

WHEREFORE, plaintiff prays:

I. That he be permitted to litigate this action without payment of cost in advance or as they accrue, or furnishing security therefor;

II. For trial by jury;

III. For judgment under the general maritime law and the Jones Act against the defendants, Department of Transportation and Development and ABC Insurance Company, in solido, for such damages as are reasonable in the premises, prejudgment interest from date of the accident, and costs;

IV. For judgment against the defendants, Department of Transportation and Development and ABC Insurance Company, in solido, for maintenance and cure.

V. For judgment against defendant, Captain Henry Bussey, for such damages as are reasonable in the premises, judicial interest from date of demand and costs.

/s/ E. Howard McCaleb III
E. HOWARD MCCALEB III
Bar #8219
Attorney for Plaintiff
3409 16th Street
Metairie, LA 70002
(504) 456-2424

Supreme Court, U.S.
FILED
AUG 9 1993
OFFICE OF THE CLERK

SUPREMECOURTOFTHEUNITEDSTATES

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL., *
Petitioners, *

V · **No. 93-147**

JOHN COSEY *

Respondent. *

* * * * * * * * * * *

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent is a seaman suing under 28 U.S.C. Sec. 1916, and pursuant to Rule 39, of the Rules of this Court, motion is hereby made that respondent be allowed to proceed *in forma pauperis*; he sought to so proceed in the Civil District Court for the Parish of Orleans and leave was granted. Respondent s affidavit is attached to this motion.

E. Howard McCaleb III Bar #9219
Attorney for Respondent, 3409 16th Street
Metairie, LA 70002 (504) 456-2424

CERTIFICATE OF SERVICE

I certify that a copy of this motion together with the attached affidavit were served upon counsel of record, Stephen J. Caire, Esq., by mail properly addressed postage prepaid, on this 9th day of August 1993.

RECEIVED
AUG 12 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREMECOURTOFTHEUNITEDSTATES

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL., *
Petitioners, *
V * **No. 93-147**
JOHN COSEY, *
Respondent. *

* * * * * * * * * * *

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, John Cosey being duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed *in forma pauperis* without paying the cost of printing to file my brief in opposition to the petition for writ of certiorari herein; that I believe I am entitled to this waiver.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting my opposition are true.

1. Are you presently employed? Answer: No

b. State the date of your last employment and the amount of wages that you received.

Answer: The last day that I worked was on the day of the accident May 14, 1991. I was earning about $1,200 a month as a Marine Oilier. I did try to earn some money to save my house which has been seized and for food. I worked for about 29 days driving people in a shuttle bus to the airport, but I could not stand the pain in my back due to the long driving and

sitting, so I had to give it up. I made about $400 before I had to give it up.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Answer: Yes.

a. Describe each source of income, and state the amount received from each during the past twelve months.

Answer: Mr. McCaleb, my lawyer, has been helping me pay the first mortgage on my home. Mr. McCaleb has given me $173 a month for the first mortgage for the last twelve months, but he missed one month when he did not have the money. So he has given me $1,903.00 in the last year for the first mortgage on my home. Mr. McCaleb has also given me $337.00 in the last year to keep my lights turned on in my home.

3. Do you own any cash or checking or savings account? Answer: No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)? Answer: Yes.

a. Describe the property and state its approximate value.

Although it has been seized by the second mortgagee, I still live in my house. It is a single story wood frame home with three bedrooms, worth about $21,000 I think. It has about a $12,000 judgment against it by the second mortgagee, and I have assigned my rights in this case over to the second mortgagee up to the amount of the judgment, if any, in order to live in the house. There is a first mortgage of about $8,000 outstanding.

My car is a 1984, 4-door Pontiac, with almost 200,000 miles on it, and I

think that it is worth about $400. I own nothing else of value.

5. List the persons who are dependent upon for support and state your relationship to those persons.

Answer: Ida Mae Cosey, my wife.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John Cosey

John Cosey

SWORN TO AND SUBSCRIBED before me, this 9th day of August, 1993.

E. Hunt Wright Jr.

NOTARY PUBLIC

Supreme Court, U.S.
FILED
AUG 9 1993
OFFICE OF THE CLERK

No. 93-147

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL.

Petitioners,

V

JOHN COSEY,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

E. Howard McCaleb III Bar #9219
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BRIEF IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' statement of the case is satisfactory, except that the petitioners failed to mention that they admitted in their answer, paragraph 13, that respondent, Cosey, has the status of a seaman.

ARGUMENT

If the United States Congress cannot constitutionally bring seamen within the scope of state compensation laws, neither can the Louisiana legislature nor its courts. *Bearden v. I.C. Breausx Towing* 365 So2d 1192, 1193 (3rd Cir 1978); U.S. Const. Art 3, Sec 2; *So. Pacific Co. v. Jensen* 37 SCt 524 (1917); *Knickerbocker v. Stewart* 40 SCt 438 (1920); *The Linseed King* 52 SCt 450 (1932)

CONCLUSION

The petition for certiorari should be denied.

E. Howard McCaleb III Bar #9219
Attorney for Respondent, 3409 16th Street
Metairie, LA 70002 (504) 456-2424

CERTIFICATE OF SERVICE

I certify that three copies of this Brief In Opposition To The Petition For Writ Of Certiorari were served upon counsel of record, Stephen J. Caire, Esq., by mail properly addressed postage prepaid, on this 9th day of August 1993.